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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 722

ALEAZUR BURRELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 913 Misc.

MATTIE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 1-8)[1] is reported at 324 F. 2d 115.

[1] A two volume certified record is on file in No. 722, to which reference will be made by volume number. We are lodging with the Clerk of this Court a one volume appendix of the trial proceedings, to which reference is made as "G. App."

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1963. Petitions for rehearing were denied on December 2, 1963. The petitions for writs of certiorari were filed on December 30, 1963 (No. 913 Misc.) and January 2, 1964 (No. 722). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In No. 722:

1. Whether the evidence showed that heroin is a narcotic drug.

2. Whether the court properly instructed the jury on the illegality of importation of "narcotic drugs" under 21 U.S.C. 173 and 174.

In No. 913 Misc.:

Whether the evidence shows sufficient possession by petitioner Moore to justify application of the presumption of knowledge of unlawful importation.

STATUTES INVOLVED

Section 171 of Title 21 U.S.C. provides in pertinent part:

> When used in sections 173, 174 * * * of this title—
>
> (a) The term "narcotic drug" shall have the meaning ascribed to the term "narcotic drugs" by section 3228(g) of Title 26 * * *.

Section 173 of Title 21 U.S.C. provides in pertinent part:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin.

* * * * *

Section 4731(a) of Title 26 U.S.C., formerly section 3228(g) of Title 26 (Supp. I, 1952 ed.), provided:

> The words "narcotic drugs" as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis;
>
> (1) Opium, isonipecaine, coca leaves, and opiate;
>
> (2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;
>
> (3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2).

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of Indiana of conspiracy to deal in unlawfully imported narcotics in violation of 21 U.S.C. 174. Petitioner Burrell was sentenced to imprisonment for ten years and fined $10,000. Petitioner Moore was sentenced to imprisonment for five years. On appeal, the convictions were unanimously affirmed (Vol. II, 1–8; Pet. No. 722, 9–18). 324 F. 2d 115.

Co-defendant Davis was selling narcotics in Indianapolis, using co-conspirator Pullens to bring in the heroin from Chicago (G. App. 98–121). In April 1961, Davis sought a new source of supply. He and Pullens were introduced to petitioner Burrell by Miss Pierce, a co-defendant, and purchased heroin from him at the St. Regis Hotel in Chicago (G. App. 133–137). On a subsequent trip, Burrell gave Pullens the non-published Chicago telephone number of the petitioner Mattie Moore and told him to call that number and ask for "Mattie" and let her know when he would be in Chicago (G. App. 147–148). A few days later, when Pullens called Miss Moore to tell her that he would be in Chicago the next day (G. App. 65–66, 151; see G. App. 200–201), she said, "[O]h yes, he told me you'd call." She told Pullens to communicate with her when he arrived (G. App. 150–151). When Pullens called Miss Moore in Chicago the next day she told him to go to the St. Regis Hotel as he had before. In Miss Pierce's room at the hotel, Pullens saw petitioner Burrell who said that the "girl" had told him

that Pullens had called. Pullens bought $1,000 worth of heroin from Burrell (G. App. 153).

Throughout the remainder of May and up to June 14, 1961, Pullens made several more trips to Chicago and purchased narcotics for Davis (G. App. 156–157). On these trips Pullens always called Miss Moore by telephone and she "directed" him "[w]here to go, what to do, meet Warbucks [Burrell] and get the heroin" (G. App. 202, 211).

On June 14, when Pullens telephoned Miss Moore, she instructed them to go to a certain address on Oakenwald Street which turned out to be her apartment (G. App. 167, 264–265). There Pullens inquired whether Burrell had communicated with her. She replied in the negative, stating that she had not been able to reach him all morning (G. App. 266). She then placed a telephone call and left word for Burrell to call her back (G. App. 168). She said that she was "waiting on him, too; he was supposed to bring her some stuff, heroin" (G. App. 168, 266). Miss Moore said that she had a boy-friend bringing "stuff" from New Orleans and that she would give Pullens and Armstrong a "better deal" than Burrell was giving (G. App. 169, 203–204; see G. App. 174, 274–275, 282). Pullens, co-conspirator Armstrong (who had accompanied Pullens from Indianapolis) and Miss Moore drove to the St. Regis Hotel where Pullens and Armstrong met Miss Pierce and purchased some heroin for their own use while Miss Moore remained in the automobile (G. App. 170–171, 269–270). The trio then returned to Miss Moore's

apartment where Pullens and Armstrong, in Miss Moore's presence, injected heroin into their veins (G. App. 171, 270).

Later that day and while Miss Moore and Armstrong were out of the apartment, Burrell telephoned the apartment, and Pullens, who answered the telephone, ordered some heroin (G. App. 168–169; see G. App. 267). Burrell subsequently arrived at Miss Moore's apartment with a quantity of heroin (G. App. 172, 271). He gave some to Miss Moore and gave Pullens seven spoons of heroin in exchange for the money supplied by Davis (G. App. 172–173, 179, 180, 186–187, 271–272, 283–284). After Burrell left the apartment, an addict entered and purchased heroin from Miss Moore and "shot" it there (G. App. 173, 187, 273–274). Pullens and Armstrong then sampled heroin there (G. App. 173–174, 272–273). Miss Moore subsequently took Armstrong's telephone number and gave him her number, stating that Armstrong and Pullens could do business with her when her friend arrived from Louisiana with narcotics (G. App. 274–275, 282; see G. App. 174).

Pullens and Armstrong were arrested while proceeding along U.S. Route 52 in Indianapolis. Inside their socks, Indianapolis narcotic detectives found seven packages of heroin (G. App. 15, 21, 27, 32, 40, 51–52; see G. App. 175, 176, 179, 276, 277).

ARGUMENT

1. Petitioner Burrell contends (No. 722, 5–7) that the evidence was insufficient to show that the heroin with which the conspiracy was concerned was a "nar-

cotic drug" within the meaning of 21 U.S.C. 171, 173 and 174, and 26 U.S.C. 4731(a), *supra*, *i.e.*, opium, isonipecaine, coca leaves or opiate, or any derivative thereof. There was, however, ample evidence at the trial that the conspirators dealt in heroin which was shown to be a derivative of opium. Law enforcement officials testified that they conducted field tests of the substances removed from Pullens and Armstrong at the time of their arrests, and that the tests were "positive", which indicated to them the presence of a "derivative of opium" (G. App. 28–30, 31, 32–33, 34, 40–41, 68–71, 75–77; see G. App. 53–54, 57). Petitioner Burrell does not even allude to these tests. A chemist testified that the powder in question contained about 35% diacetyl morphine hydrochloride, a substance commonly known as heroin hydrochloride, a "narcotic drug" (G. App. 219–220). This was sufficient to show that the heroin with which the conspiracy was concerned was in fact derived from opium within the meaning of 26 U.S.C. 4731(a). See *United States* v. *Bailey*, 277 F. 2d 560, 565 (C.A. 7).

Moreover, there would be no merit in the contention even if there had been no evidence adduced that heroin is derived from opium. As the court below correctly held, it is a matter of common knowledge that heroin, though found in a compound, is a derivative of opium. *United States* v. *Pisano*, 193 F. 2d 355, 359 (C.A. 7), and cases cited; *United States* v. *Holmes*, 187 F. 2d 222, 225 (C.A. 7), certiorari denied, 341 U.S. 948, and cases cited.

2. Petitioner Burrell also contends (No. 722, 7) that the trial court erred in giving Instruction No.

19 because 21 U.S.C. 173, *supra*, does not by its terms bar the importation of heroin. The short of the matter, however, is that Instruction No. 19 (Vol. I, 28–29) simply told the jury that the importation of heroin was prohibited under 21 U.S.C. 173 only if the jury first determined beyond a reasonable doubt and "in accordance with [its] instructions that *heroin is a narcotic drug*" (emphasis added), a term which the court defined in Instruction No. 21 (Vol. I, 34–35), quoting the definition of narcotic drugs from 26 U.S.C. 4731(a).

3. Petitioner Moore contends (No. 913 Misc., 8–12) that the evidence is insufficient to show that she had the requisite dominion and control over the narcotics involved in the conspiracy to support a finding of constructive possession of those narcotics. The court below, however, correctly held that sufficient possession was shown by virtue of the fact that Miss Moore managed heroin sales when she "took the orders, made arrangements and even used [her] own premises for the purposes of transfers." 324 F. 2d at 119. As shown by the Statement, *supra*, after Burrell gave Pullens the telephone number of Miss Moore, she directed Pullens "[w]here to g , what to do, meet Warbucks [Burrell] and get the heroin" (G. App. 202, 211). On the several narcotics transactions that followed, Pullens, pursuant to these directions, went to the St. Regis Hotel where he met Miss Pierce and Burrell and purchased heroin from Burrell. On June 14, 1961, when Burrell came to Miss Moore's apartment (after she had invited Pullens there and had

left word for Burrell to telephone the apartment), he gave narcotics to Pullens and to Miss Moore (G. App. 167–168, 172–173, 179, 180, 186–187, 264–266, 271–272, 283–284). Although no principal-agent relationship between Miss Moore and Burrell was established, the evidence nevertheless sufficiently shows that Miss Moore had a close working relationship with Burrell and that, without difficulty, she was able to assure production and delivery of heroin to Pullens as a matter of course. This is constructive possession of narcotics. *E.g., United States* v. *Hernandez*, 290 F. 2d 86, 90 (C.A. 2); *United States* v. *Gibson*, 310 F. 2d 79, 81 (C.A. 2); *Cellino* v. *United States*, 276 F. 2d 941, 943, 946 (C.A. 9); *United States* v. *Wright*, 309 F. 2d 735, 737–739 (C.A. 7), certiorari denied, 372 U.S. 929. She was not a casual facilitator or aider and abettor as in *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9), or *United States* v. *Jones*, 308 F. 2d 26 (C.A. 2).

Moreover, on June 14, 1961, a heroin transaction between Pullens and Burrell took place in petitioner's apartment, in her presence and with at least some arrangement on her part. That alone was sufficient evidence to show dominion and control over those narcotics; the control which Miss Moore exercised over her own apartment carried with it an incidental control over all that took place there in her presence. See *e.g., Evans* v. *United States*, 257 F. 2d 121, 128 (C.A. 9), certiorari denied, 358 U.S. 866; *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9), certiorari denied, 371 U.S. 930. While the proof does not show

that the narcotics which Miss Moore physically received from Burrell and sold to an addict on June 14, 1961, were part of the narcotics involved in the conspiracy to transport heroin to Indianapolis for distribution and sale there, her ability to arrange for the delivery of narcotics, both to herself and to Pullens, serves to emphasize the fact that she did, in a realistic sense, control the narcotics which were transferred on that date and on the many occasions prior thereto.[2]

CONCLUSION

For the reasons set forth, we respectfully submit that the petitions for writs of certiorari should be denied.

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[2] While it is true that a conflict exists in the circuits as to whether the possession of narcotics by one conspirator may legally be imputed to other non-possessing conspirators (compare *Valentine* v. *United States*, 293 F. 2d 708 (C.A. 8); certiorari denied, 369 U.S. 830, with *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9)), that conflict has no application to the instant case since the jury was instructed only along well defined and established lines of actual and constructive possession of narcotics (Vol. I, 29–31, 35–36). The courts below did not rely upon any theory of imputed possession from one conspirator to another.

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